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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-812

CHAMPION OIL SERVICE COMPANY, *Petitioner*

v.

SINCLAIR OIL CORPORATION, SINCLAIR REFINING COMPANY, AND ATLANTIC RICHFIELD COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Champion Oil Service Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 29, 1974.

OPINIONS BELOW

The opinion of the court of appeals, reported at 502 F.2d 709, appears in the Appendix hereto at 1a. The opinion of the United States District Court for the Southern District of Ohio, Western Division, denying respondents' motion for a judgment notwithstand-

ing the verdict or the alternative relief of a new trial, not officially reported, appears in the Appendix hereto at 12a.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1974. By order of Mr. Justice Stewart, dated November 13, 1974, the time for filing a petition for writ of certiorari was extended to and including December 27, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals, in setting aside a jury verdict in a private antitrust action challenging vertical arrangements, improperly compartmentalized the evidence and failed to review the evidence, especially that which showed anticompetitive intent, in the context of the wide ranging inquiry appropriate in Sherman Act rule-of-reason cases

2. Whether vertical arrangements which impose crippling restraints on local independent jobbers' freedom of action do not violate section 1 of the Sherman Act unless it is further demonstrated that there is consequent regional impact upon major integrated suppliers.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

A. The Parties

In 1946, Glenn E. Douglass became a wholesale and retail distributor of petroleum products by leasing a combination retail gasoline and bulk plant facility (I App. 43; Tr. 74).[1] Shortly thereafter, as his operations expanded to the distribution of fuel oil for heating homes, and wholesaling motor fuels to service stations and commercial accounts, Douglass formed a corporation, the Champion Oil Service Company ("Champion") (Tr. 80-81). As a result of innovative marketing techniques, Champion substantially expanded its business so that by 1958 it was operating two bulk plants and supplying twelve retail gasoline stations in Butler County, Ohio (Tr. 78, 86). By 1958, Champion's annual sales volume exceeded 6,000,000 gallons of gasoline products and fuel oil, which were marketed under the "Champion" brand at the same prices as were the national brands (I App. 43-44, 46, 126). In 1958, Champion's sales accounted for 39.86% of the independent jobber gasoline market and 48.4% of the independent jobber fuel oil market in Butler

[1] References to the "App." are to the Appendix of three volumes filed before the Court of Appeals for the Sixth Circuit. A single copy of the Appendix has been lodged with the Clerk of this Court. References to the "Tr." are to the transcript of the trial, which was part of the certified record on appeal.

County, Ohio. (I App. 236-237). Champion's share of unbranded gasoline in Butler County amounted to 87.79% and its share of unbranded fuel oil in the same market amounted to 94.49% (I App. 237-238).

Sinclair Refining Company was, prior to September 30, 1968, the wholly owned marketing subsidiary of the Sinclair Oil Corporation (I App. 17-18). On that date, the subsidiary was merged into the parent and the subsidiary's separate corporate existence ceased (I App. 17). As of the close of business on March 4, 1969, Atlantic Richfield Company and Sinclair Oil Corporation merged, with the former continuing as the surviving corporation after that date. At the time of the merger, Sinclair Oil Corporation and Atlantic Richfield Company were both "large integrated oil companies and [were] among the nineteen major integrated oil companies in the United States." *United States* v. *Atlantic Richfield Co.*, 297 F.Supp. 1061, 1064 (S.D. N.Y. 1969).[2] In 1967, Sinclair's total revenues exceeded $1.5 billion; at the same time its total assets exceeded $1.8 billion, ranking it

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[2] The merger was opposed by the Department of Justice which obtained a temporary restraining order, *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1060 (S.D. N.Y. 1969), and then a preliminary injunction, *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D. N.Y. 1969), blocking consummation of the merger. After changes in the details of the transaction and with Atlantic's assurances that it would preserve its ability to comply with any divestiture order, the preliminary injunction was vacated without opposition by the government. *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1075 (S.D. N.Y. 1969) Ultimately, by consent decree entered on August 28, 1970, Atlantic was ordered to divest the Sinclair gasoline marketing assets which it had acquired in fourteen specified states, as well as certain crude oil production, refining, and refined product transportation assets. *United States* v. *Atlantic Richfield Co.*, 1970 CCH Trade Cases ¶ 73,820 (S.D. N.Y. 1970).

thirteenth, and it ranked fifteenth in net earnings with net earnings exceeding $95 million. *See id.* In 1967, its refining capacity of 450,000 barrels per day accounted for just over 4% of domestic refining capacity, ranking it eighth among domestic refiners. *See id.* It then marketed gasoline throughout the United States with the exception of the far Western States.

Throughout these proceedings, Sinclair Refining Company, Sinclair Oil Corporation, and Atlantic Richfield Company have been collectively treated and referred to as "Sinclair." That collective treatment will be continued in this petition.

B. Course of Proceedings

This case began on July 15, 1969, when Champion Oil Service Company instituted an antitrust suit against Sinclair Oil Corporation, Sinclair Refining Company and the Atlantic Richfield Company alleging violations of the Sherman Act and Clayton Act. On December 31, 1969, the respondents filed their answer. After extensive pretrial preparations, which included pretrial briefs defining the legal and factual issues and an extensive stipulation of facts (I App. 42-129, 186-187), the trial court granted respondents' motion for partial summary judgment on October 6, 1972 (I App. 186-213). As a result of the trial court's disposition on summary judgment, a trial was held on whether the arrangements between Champion and defendants, including lease and leaseback arrangements, constituted a non *per se* violation of Section 1 of the Sherman Act as a contract or combination in unreasonable restraint of trade (I App. 213).

The court conducted a bifurcated trial on the issues of liability and damages. Between October 10 and 19,

1972, a trial was held on liability before a blue ribbon jury chosen by agreement of the parties. (Tr. 9-10). On October 19, 1972, after deliberation, the jury returned a verdict on liability in favor of petitioner by answering three special verdicts affirmatively (II App. 523-524, 692). Between October 26, 1972 and November 1, 1972, a trial was held on damages and on November 3, 1972, the jury, after deliberation, returned a verdict of $989,457 in favor of petitioner (II App. 692-693). Pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, the verdict was trebled and a judgment in the amount of $2,968,371 was entered in favor of petitioner on January 2, 1973 (II App. 692-693). On May 10, 1973, the trial court denied the respondents' motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial (II App. 694-701).

The United States Court of Appeals for the Sixth Circuit reversed and remanded with instructions to the trial court to enter judgment notwithstanding the verdict dismissing the complaint (1a, 12a). The court of appeals concluded "that there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade." (11a).

C. Statement of the Facts

1. Champion's arrangements with Sinclair

During the period 1957-1958, Douglass was approached by the wholesale representative of Sinclair Refining Company with a view toward persuading Champion to become a Sinclair distributor in Butler County, Ohio (I App. 47, 238-239). Champion's reputation as a petroleum marketer was well-known and Sinclair was aware that "every major company

. . . would have liked to have had the account." (Tr. 440). Although Champion had been approached by other suppliers who could provide access to a national credit card, Douglass was particularly attracted to the Sinclair offer because of its highly publicized "estate building" program (I App. 239). The Sinclair "estate building" lease and leaseback program provided Champion with the prospect of eventually owning retail gasoline stations, which it had been unable to do in the past since it was growing faster than it was accumulating working capital (I App. 239).

A series of meetings between Sinclair representatives and Douglass were held to discuss an arrangement between the two companies (I App. 47, 326). As a result of the discussions, Champion entered a Sinclair distributor contract for Butler County (I App. 57). This agreement ran for a term of one year, continuing thereafter from year to year for up to ten years unless terminated by appropriate notice of either party prior to the end of any one year. In addition, Sinclair agreed to give Champion the "exclusive territory of Butler County" and leased to Champion ten of its then existing retail stations and turned over substantially all of its fuel oil business to Champion in Butler County (I App. 57-58, 275-276; Tr. 104-105). Sinclair also agreed to provide financial assistance for expanding Champion's business (I App. 275-277).

During the period from 1958 through 1963, Champion participated in the Sinclair "estate building" program and developed one existing and six new retail stations (I App. 240-241). Champion owned the six new stations which were secured with one hundred percent financing by bank loans and covered by fifteen

year mortgages (I App. 241). Sinclair was not a signatory to any of the note instruments to the banks or to the mortgages or deeds on the service stations. (I App. 258). However, it was Sinclair's policy to employ the fifteen year base lease approach even when a distributor did not require financing by a lending institution (I App. 329-330). Accordingly, on each of the seven stations, Champion executed fifteen year leases to Sinclair which were coextensive with the Champion notes to the banks on the stations. Champion assigned the rentals due it from Sinclair on these base leases, which were identical to Champion's mortgage payments to the banks (P. Ex. 6, III App. 1, 5). However, the base leases permitted Sinclair to offset any indebtedness owing from Champion to Sinclair against any rental obligations of Sinclair.

Simultaneously with the execution of the base lease on each of the seven stations, Sinclair leased back each station to Champion. (I App. 241-242; Tr. 102; P. Ex. 9, III App. 7, 8). Although the base leases to Sinclair on each of the seven stations were not cancellable for fifteen year terms, the leasebacks on each station were cancellable by Sinclair upon termination of the distributor agreement between Sinclair and Champion (I App. 242).

2. Sinclair's efforts to control Champion's volume

Champion's annual sales of gasoline and fuel oil increased under the Sinclair brand from 1958 through 1965. By 1965 Champion was supplying nineteen retail stations in that market—six stations owned by Champion and one land development station, which were under the "estate building" program; one station owned by Champion not under lease; six Sinclair stations remaining out of the group

turned over to Champion in 1958; and five third-party leases (I App. 255-256). Excluding the Sinclair stations, which accounted for about 700,000 gallons in 1965, Champion's share of the independent gasoline jobber market in Butler County was 40.49% (I App. 254-255). Champion's fuel oil sales accounted for 13.79% of all such sales in Butler County. (I App. 255).

Nevertheless, Champion began developing financial problems and suffered losses in 1965 (I App. 126; II App. 601-603). In the spring of 1965, Champion's cash flow problems heightened due to excess accounts receivables and the adoption of a meter reading program which increased cash demand. Douglass wrote Sinclair requesting financing assistance to work out the problems (I App. 64). Prior to this time Champion had issued several checks to Sinclair which had been returned for insufficient funds (I App. 64). On May 24, 1965, Sinclair refused to permit Champion to purchase petroleum products on other than a C.O.D. basis (I App. 65). As a consequence, Champion's cash shortage was accelerated and Champion began purchasing substantial amounts of gallonage from competing suppliers such as Sun Oil Company and American Oil Company (Tr. 197-198). Douglass advised Sinclair representatives, who were concerned that competing supplier petroleum products were being distributed through Sinclair "branded" stations, that it was a matter of self-preservation and it was either that or close the doors (Tr. 371-372). Champion was forced to purchase petroleum products from any supplier that was willing to give the company credit (I App. 332). Indeed, by the end of 1965, Champion was purchasing approximately 98% of its gallonage

needs from competing petroleum product suppliers who were willing to provide credit terms (I App. 128, 298).

On June 24, 1965, Sinclair officers held a meeting in Chicago to discuss Champion's financial problems and the fact that Champion was making substantial purchases of petroleum products from Sinclair's competitors (Tr. 372-373, 451-453). This had been one of the many meetings Sinclair officers held to discuss the problem of Champion purchasing petroleum products from Sinclair's competitors (Tr. 453). On June 30, 1965, the Sinclair officers had a meeting with Douglass to discuss Champion's financial problems and the fact that Champion was making substantial purchases from competing suppliers (I App. 66; Tr. 371-374). During the meeting on June 30, 1965, William R. Kelly, Sinclair's Regional Manager and Frank E. Treat, Sinclair's wholesale representative, were quite critical of Champion's outside petroleum purchases (Tr. 371-372). Subsequent to the meeting, Kelly emphasized to Treat that "we simply cannot condone a competitor's product going through our equipment" and "we should take whatever steps are necessary to safeguard our investment." (I App. 332; Tr. 372-374).

On July 3, 1965, Douglass wrote to Sinclair requesting a loan as a solution to its financial problems and indicated that Champion's current capital needs amounted to approximately $712,000.00. (I App. 67). Subsequently, a meeting was held in Sinclair's New York office to discuss Champion's request for a $700,000 loan (I App. 127). Douglass testified that, shortly after this meeting, he was advised in a telephone conversation with Mr. Harry H. Young, Vice-President of Sinclair, that Sinclair would not make the loan re-

quested. (I App. 246-247). Douglass stated that he had asked Young if Sinclair would release Champion from the leases and sales contracts so that Champion could approach another supplier for a distributorship and that Young retorted that this could not be done (I App. 247). Young could not recall this telephone conversation with Douglass (Tr. 476-477).

On August 31, 1965, William R. Kelly, Sinclair's Regional Manager, advised Mr. Vearl R. Gordy, Sinclair's Ohio State Manager, that the loan to Champion had been turned down and presented four alternative proposals with respect to the Champion situation "to retain representation and profitable gallonage in the Hamilton area . . . ." (P. Ex. 35, III App. 33). In discussing one of the alternatives, total purchase by Sinclair of all the Champion assets, Kelly observed that "Douglass would probably have difficulty selling the company to a competitive marketer without our leases on the fourteen stations." (P. Ex. 35, III App. 35). Likewise, although he recognized that the alternative of cancelling the base leases and retiring Champion's debt would "enable Douglass to sell the entire enterprise to a competitor at a higher price than Sinclair would be willing to pay," he recommended against this alternative "[i]n view of our profit estimate on the Fourteen stations" and because "[t]his would put us [Sinclair] out of business in the Hamilton area," (P. Ex. 35, III App. 35). Kelly also outlined the possibility of a partial purchase by Sinclair of the seven leased stations and the Hamilton bulk plant owned by Champion combined with a marketer arrangement, a proposal which would permit Sinclair "to hold the entire [Champion] volume on a dual basis." (P. Ex. 35, III App. 34).

During the latter part of 1965, Sinclair representatives focused on variations of the partial purchase proposal included in Kelly's recommended alternatives (Tr. 376-383; P. Exs. 36, 41, III App. 36 & 44). On September 10, 1965, Gordy proposed a partial purchase variation which was designed "[t]o protect our Company's interests insofar as retaining representation and profitable gallonage in the Hamilton area. . . ." (P. Ex. 36, III App. 36). This proposal included granting Champion the right to repurchase the properties, provided that Champion entered into lease and leaseback arrangements with Sinclair "to assure our control of representation and profitable gallonage." (P. Ex. 41, III App. 38). Indeed, Gordy emphasized in his September 10 recommendation that the proposal would accomplish retention of volume and excellent "control" over gallonage and future operations (I App. 343-344; P. Ex. 41, III App. 41).

On September 20, 1965, Douglass contacted Sinclair expressing frustration at Sinclair's delay in arriving at some form of settlement (P. Ex. 39, III App. 42). Reacting to this request, Gordy notified his superior that immediate action was required on Sinclair's part (P. Ex. 40, III App. 43). Gordy "strongly advocated" that Sinclair cancel Champion's distributor contract and retain the eight service stations owned by Champion (P. Ex. 40, III App. 43). Acknowledging that "there is more to this proposal than merely retaining eight service stations and cancellation of Distributor agreements," Gordy's position was a clear rejection of any partial purchase of Champion's assets. *(Ibid.)*

On January 6, 1966, Mr. R. T. Schroeder, Sinclair's Regional Manager of Distributor Sales, noted that he

favored a modified version of a partial purchase proposal since Sinclair:

> . . . will not only retain the business at these 14 service stations . . . but also save a total of 5,849,360 gallons, in addition to the 2,071,300 gallons that will be retained at the 14 retail outlets. Since last March price realizations in Champion's marketing area have improved considerably and would provide us with a nice profit; however, as you know 98% of their [Champion's] purchases have been made on the outside beginning with April of this year. This would be a nice piece of business to save and I wholeheartedly recommend to you and ask your support and approval. (P. Ex. 41, III App. 44, 48).

Schroeder's proposal did not include the lease/lease-back requirement in the event of Champion's repurchase as was contained in Gordy's earlier proposal. On January 22, 1966, Gordy sent a memorandum to Schroeder explaining that he could not recommend the partial purchase proposal outlined by Schroeder since there was no assurance that Champion could improve its profits, and:

> Further, what assurance do we have of Champion remaining as our branded distributor? If we purchase the service stations and resume lease obligations of those service stations we control by underlying lease, there is nothing to preclude Champion from obtaining additional re-financing from a competitor and consequent change of supplier (P. Ex. 45, III App. 49, 51).

In the interim, on January 18, 1966, Schroeder had conveyed to Douglass the basic terms of the partial purchase proposal except for the lease/lease-back condition in the event of Champion's repurchase (P. Ex. 18, III App. 23).

On January 25, 1966, Sinclair officers held a meeting to discuss the Champion situation. During the meeting Kelly proposed releasing all the stations owned by Champion to permit Champion to go to a competitive supplier upon receipt of payment of its account with Sinclair (P. Ex. 46; Tr. 519). Gordy proposed that Sinclair retain three of the stations and return only five to Champion. (I App. 354). At this meeting, a decision was made to permit Gordy to pursue his proposal with Douglass. If unsuccessful, Sinclair was to move in on all locations and cancel the distributorship arrangement (P. Ex. 46). On January 26, 1966, Gordy notified Douglass that Sinclair was withdrawing the partial purchase offer contained in Schroeder's letter of January 18, 1966 (Tr. 388-389; P. Ex. 19, III App. 25).

3. Sinclair's first step in taking control

On January 27, 1966, Champion notified Sinclair of the cancellation of the distributor agreement between Sinclair and Champion in an effort to break the deadlock in the negotiations (I App. 77, 251). On February 4, 1966, Gordy and Schroeder met with Douglass and agreed to release Champion from its distributor agreement prior to its expiration date (I App. 77). In addition, over Douglass' objection, they proposed to take back the six service stations, which originally had been Sinclair stations in 1958, and to cancel the leases to Champion on four of the stations owned by Champion (I App. 77, 251). Although Gordy indicated that the takeover would help alleviate Champion's problems, Douglass objected to the takeover of the ten stations since it would increase Champion's cost of operation (I App. 251-252). Gordy advised Douglass that he was authorized to take over

all the stations that Sinclair had leases on "so I better agree to the proposed four . . . ." (I App. 283).

On March 4, 1966, Kelly instructed Gordy that "unless the proposal presented by you and Mr. Schroeder is acceptable in all of its terms, then we should take back our leases and operate the stations in the manner proposed." (Tr. 403-404). Schroeder also directed Gordy, on March 4, 1964, to be prepared to move in and take over the fourteen service stations on April 1, 1966, noting that Sinclair would take over only ten stations if Champion was successful in working out a deal with a competing supplier. (P. Ex. 48, III App. 52). These instructions were consistent with the decision made earlier by Schroeder's superior, Howe, during the January 25, 1966, meeting (P. Ex. 46). Gordy later reported to the Sinclair management that the takeover "was orderly and without difficulty" and that Champion cooperated one hundred percent. (I App. 77-80). As a result of the takeover, Champion's annual gallonage went from 8 million to 6 million, which caused a reduction in gross profit and increased Champion's cost per gallon by a cent and a half on the remaining gallonage (I App. 259; Tr. 163). The three service stations that Sinclair permitted Champion to retain had a substantially lower investment return than the four service stations which were taken over by Sinclair (I App. 351-352). After April 1, 1966, Sinclair directly supplied the ten stations which had been taken over from Champion (I App. 370-371).

Sinclair was well aware at the time of the takeover of the ten stations that it would be virtually impossible for Champion to attract another supplier without its four best stations. As early as August 1965, Kelly stated that "Douglass would probably have difficulty

selling the company to a competitive marketer without our leases on the fourteen stations [eight Champion and six Sinclair stations]." (P. Ex. 35, III App. 35). Moreover, Kelly was aware that Champion wanted to make a deal with a competitor and that the more stations he had available "the more desirable his business would be for another supplier." (I App. 318). However, Kelly's proposal to release all the stations owned by Champion to permit it to go to a competing supplier was rejected at the January 25, 1966 meeting (P. Ex. 46).

After Sinclair advised Champion of the takeover of the ten service stations, three competitors of Sinclair, Sun Oil Company, Cities Service Oil Company (Citgo) and American Oil Company, ended their negotiations relating to distributor arrangements, which had begun in late 1965. On March 24, 1966, Citgo rejected a distributor arrangement with Champion based on a financial analysis of its Credit Department, which concluded that Champion was in a weak financial situation. (Def. Ex. F, II App. 100-102). This rejection was not communicated to Mr. Douglass at the time (I App. 304). Prior to the rejection, Citgo was aware that Sinclair had refused to refinance Champion (Def. Ex. F, III App. 100). The negotiations with Sun Oil Company, which had begun in 1965, developed to the point where Sun would undertake affiliation with Champion on a guarantee basis if Champion were able to get its financial house in order (II App. 473-475). Sun's representative had concluded that Champion needed $350,000 in order for an affiliation to develop (I App. 478). Sun had been interested in a Champion distributorship arrangement as early as 1962-1963 and continued its interest in

1965-1966 (I App. 129). One of the factors in the Sun interest was that Champion had purchased fuel oil from Sun in 1965 and 1966 (II App. 476).

4. Sinclair's second step in taking control

In June of 1966, Gordy of Sinclair indicated that it was his personal opinion that Champion could not survive (P. Ex. 50, III App. 53-54). Gordy was also aware that Citgo management had rejected a deal with Champion and that Champion's possibilities of developing a relationship with Sun Oil or American Oil were quite limited (P. Ex. 50, III App. 54). Gordy advised the Sinclair management that "If I can maintain the present relationship I believe we have an excellent opportunity to pick up much of the volume [of Champion] through one means or another." (P. Ex. 50, III App. 54). During this period Champion was operating on a month-to-month distributor agreement with Sinclair (I App. 83).

In September 1967, Gordy met with Douglass to discuss converting Champion to a commission marketer agreement, a transition which only occurred when a jobber was in trouble and its supplier wanted to gain control of the jobber's volume to prevent it from going to competing suppliers (I App. 259, 261). In August, Gordy had explained the purpose of converting Champion to the marketer arrangement to Sinclair management:

> First, we must take the proposed [commission marketer] route in order to acquire certain controls of the approximately six million gallons of light oils available in this market. This is an important factor (P. Ex. 51, III App. 51, 58).

Parenthetically, he noted that Sinclair had a moral obligation to aid Champion to survive its financial

predicament (P. Ex. 51, III App. 58), but the purpose of the conversion was the "opportunity to acquire six million gallons of profitable product annually at no cost to Sinclair . . . ." (P. Ex. 53, III App. 59, 61). Thus, on November 16, 1967, Gordy requested Sinclair management to be tolerant "until such time as we can get the total Champion volume under control . . . ." (P. Ex. 53, III App. 61).

5. Sinclair's completion of the takeover

In February 1968, Sinclair cancelled the commission marketer arrangement and converted the bulk of Champion's gasoline and fuel oil business to a direct operation with Champion's employees becoming salaried personnel of Sinclair and Sinclair leasing Champion's office space and equipment (I App. 374; Tr. 169-170). With enthusiasm Gordy later remarked that Sinclair had acquired "control" over "certain volume on a direct basis at no cost to our company." (P. Ex. 54, III App. 62, 63).

In a final effort to save his business, Douglass presented three proposals to Gordy with the request that Sinclair release Champion from the sales contracts and leases if none of the alternatives were acceptable to Sinclair (P. Ex. 21, III App. 28, 29). Gordy recommended against Champion's proposals because there were 3,300,000 gallons of petroleum product in the Champion operation which would not be controlled by Sinclair and which he feared could be diverted to a Sinclair competitor. (P. Ex. 57, III App. 65). Expressing moral and legal qualms about Sinclair capturing Champion's 2,300,000 gallon fuel oil business, Gordy recommended against releasing Champion from

its sales contracts and leases with Sinclair (P. Ex. 57, III App. 66).

On June 24, 1968, Sinclair delivered the final blow. Gordy advised Douglass that all his proposals were unacceptable (P. Ex. 59, III App. 67). Despite the fact that Champion's equity position in the stations that it owned was approximately $400,000 as of December 31, 1968 (I App. 107), Champion lost substantially all its business in Butler County. No longer a viable competitor in Butler County, Champion was left with its Dayton facility and continued to operate its burner and air-conditioning service business (I App. 270).

On the other hand, in capturing Champion's retail gasoline and fuel oil business, Sinclair obtained even more than it previously hoped for, when it considered purchase of some of Champion's facilities in September 1965 (I App. 380-381). Moreover, instead of paying Champion $720,000, as was proposed in 1965, Sinclair took over Champion's facilities and customers at little or no cost. (I App. 382-383).

D. The Judgments Below

After hearing the evidence and receiving the trial court's final instructions, the jury returned special verdicts in Champion's favor and, following the damages phase of the trial, assessed actual damages at $989,457; pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, the trial judge trebled the award and entered judgment for Champion in the amount of $2,968,371 (II App. 692-693). Sinclair's motion for judgment notwithstanding the verdict, or, alternatively, a new trial was denied (II App. 694-701). In denying this motion, the trial judge withdrew his reser-

vations on sufficiency of the evidence previously expressed at the time the motion for directed verdict was denied, noting that "the matter called to attention in plaintiff's final argument changed the court's mind on that subject." (II App. 699).[3]

Sinclair appealed on the grounds that (1) there was insufficient evidence to go to the jury, (2) that the trial court failed to exclude certain evidence introduced during the damage phase of the trial and, (3) that the trial court improperly refused to instruct the jury on its proferred *in pari delicto* defense. The court of appeals agreed with Sinclair's position on the first issue, reversing and remanding with instructions to enter judgment notwithstanding the verdict (12a). The court concluded "that there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade;" proof it regarded as essential in non *per se* cases. (11a) In light of this disposition, the court declined to reach Sinclair's other asserted grounds for reversal.[4] (11a)

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[3] The Court of Appeals quoted the trial judge's reservations but gave no indication that it was aware of his withdrawal of those reservations. (8a)

[4] If this Court grants the petition for a writ of certiorari we propose to argue that Sinclair's grounds for appeal not reached by the court of appeals would not have required reversal and that this Court should, unless it limits the grant of certiorari to the questions discussed herein, reinstate the verdict.

REASONS FOR GRANTING THE WRIT

The court of appeals was called upon to review a jury's determination that the extensive vertical arrangements between Champion and Sinclair were unreasonable restraints of trade which had damaged Champion in its business and property. In setting aside the verdict, the court single-mindedly focussed upon a single element of that arrangement, wholly ignoring the multifaceted inquiry well established as appropriate in rule-of-reason antitrust cases. It thereby disregarded the abundant evidence that the arrangement imposed crippling restraints upon Champion's freedom to select its suppliers in its own interests, ultimately removing Champion as an effective competitive force in the distribution of refined petroleum products in its own local market, as well as the overwhelming evidence that Sinclair intended to achieve this result. The court's sole concern was whether the proofs demonstrated an impact on Sinclair's major integrated competitors' operations over the region in which they did business. Accordingly, the writ should be granted to correct the court of appeals' departure from the rulings of this Court and from the accepted and usual course of judicial proceedings.

Involved herein is a series of contracts between Sinclair and Champion. Among these agreements were lease/leaseback agreements, which Champion considered as mere financing instruments and not a commitment for affiliation with Sinclair for 15 years. Nevertheless, the cancellation provisions of the leaseback agreements subjected Champion to the risk of loss of its stations if Champion dealt with other suppliers, and, when Champion did so, the cancellation provisions were used to force Champion into further damaging arrangements. The purpose and effect of the arrangements, as the record demonstrates, was to prevent Champion from extricating itself from its financial problems and to enable Sinclair to control Champion's facilities and customers.

In the instant case the jury was entrusted with the task of assessing the lawfulness of the restraints under

the rule of reason.[5] The appropriate inquiry under this approach is a wide ranging one:

> "[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918).

This Court has curtailed the inquiry only with respect to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 5 (1958). In all other instances, it has insisted that all relevant facts be exhaustively examined within the framework of the rule of reason. For example, where a plaintiff chal-

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[5] The role of a jury in weighing the sometime conflicting evidence presented over seven trial days in a complex antitrust case is arduous, but a role for which a jury is peculiarly suited. Accordingly, the court of appeals recognized that it was required to view the evidence in the light most favorable to [Champion] and . . . give it the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn." (8a). This deference to the fact-finding responsibility of the jury was particularly appropriate in this case since, as the trial judge noted: "the jurors were hand-picked, every attempt was made to inform them appropriately as to the facts and the law, and they were extremely conscientious in the performance of their duties." (15a). Yet, through its restrictive view of the evidence and artificial analytical approach, the court of appeals evaded what it purported to recognize as the limited character of appellate review.

lenging a tying arrangement has not met the criteria for *per se* unreasonableness,[6] this Court emphatically rejected the notion that this failure was fatal to his case, noting that he "can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500 (1969).

In contrast with the comprehensive analysis required by the rule-of-reason, the court of appeals compartmentalized the evidence and narrowly conceptualized the instant case as fitting into the requirements contract mold. Once that had been done the court mechanically followed what it perceived to be the appropriate legal standard. This treatment is singularly inappropriate since the components of the arrangement are not to be tightly compartmentalized and separately scrutinized; the jury may, indeed must, evaluate the entire course of dealings between the parties. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). The evidence demonstrates a far more complex set of arrangements between the parties. Such evidence required the rule-of-reason analytical approach—one far more extensive than a single-minded insistence that the evidence reveal a restraint on Sin-

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[6] Tying arrangements are per se unreasonable "whenever a party has a sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 (1958).

clair's major oil company-competitors throughout the Southwestern Ohio area [7] (10a-11a).

Given the long and extensive relationship between the parties, the court of appeals was obligated to explore several factors in determining whether the jury's finding of unreasonableness had evidentiary support. However, various important paths of inquiry were not pursued. Wholly absent from the court's analysis was any consideration of the restraint which Sinclair imposed upon Champion's freedom of action in selecting the suppliers with which it would deal or any exploration of the availability of less restrictive alternatives. Indeed, as we demonstrate below, the evidence plainly shows that Sinclair rejected less restrictive alternatives to their course of action and proceeded with the primary objective of retaining "control" over Champion's gallonage, i.e., that Champion could not supply its account with gasoline purchased from others. This and other evidence bears upon the key issue — untouched by the court of appeals — of Sinclair's purpose and intent.

A striking omission on the part of the court of appeals was its disregard of the economic coercion

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[7] A corrollary of the court's erroneous belief that the case involved solely restraint upon competition between oil company suppliers, instead of competition at the levels at which Champion operated, is an erroneous concept of the relevant geographic area. The case presented to the jury concerned competition in Butler County at the jobber level, at the retail level, and in the sale of fuel oil to home owners in Butler County. The evidence shows that Sinclair consistently treated this as a Butler County problem and that its objective was to control Champion's business in Butler County. Moreover, as this Court has recognized, competition between major integrated refiners is directed towards securing the maximum number of strategically located retail outlets in any particular local market. *See Standard Oil Co.* v. *United States*, 337 U.S. 293, 304 n. 6 (1949).

which the proofs showed Sinclair to have utilized in its efforts to restrain Champion from distributing competing products. As this Court has long recognized, coercive vertical restraints are potentially unreasonable at the buyer or seller level. For example, tying arrangements conflict with the fundamental policies embodied in the antitrust laws, and are thus unreasonable, in part because "buyers are forced to forego their free choice between competing products." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 6 (1958).[8] In addition to such coercive practices which cut across industry lines, leverage through lease arrangements in the marketing of petroleum products has been the subject of judicial scrutiny, as in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), where a service station operator asserted that Union had utilized the cancellation provisions of station leases and consignment contracts to compel Union's dealers to adhere to retail prices which it set. Casting its analysis in terms of the overall arrangement, this Court noted that:

> "If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or *remain consignees,* and, in any event, to sell at competitive prices." *Id.* at 16. (emphasis added)

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[8] The other evil of tying arrangements articulated in *Northern Pacific* is that "they deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." *Id.*

The supplier's leverage accruing from short-term cancellation provisions in service station leases was again recognized in *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357, 368 (1965). There, these provisions were utilized to eliminate those dealers who refused to purchase substantial quantities of tires, batteries, and accessories (TBA) from the gasoline supplier's designee. *Id.* at 364-67.

The lower courts too, have not ignored lease provisions in this industry when coercively used and have condemned the resultant restraint upon the buyer. *See, e.g., Sahm* v. *V-1 Oil Co.,* 402 F.2d 69 (10th Cir. 1968); *Osborn* v. *Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963). Oral requirements contracts which the major oil company supplier enforced through the exercise of the 24-hour cancellation clause contained in its service station leases were struck down in *United States* v. *Richfield Oil Corp.,* 99 F.Supp. 280 (S.D. Cal. 1951), *aff'd per curiam,* 343 U.S. 922 (1952). Again the court focused on the twofold evils of the arrangement—the station operators were denied their right to deal with other suppliers and other suppliers were denied the opportunity to compete for the operator's business. *Id.* at 293-94.

The common thread of these decisions is the recognition that such provisions are unlawful because they strike at the very heart of the economic system which the Sherman Act was intended to protect—freedom of independent business action. The court of appeals gave absolutely no consideration to the impact of the challenged practices upon Champion's freedom to select its suppliers in accordance with its own best business judgment, but viewed the sole relevant ques-

tion to have been whether Sinclair had foreclosed its competitors from the market.[9]

The proofs at trial clearly demonstrated Sinclair's coercive use of the contracts between the parties.[10]

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[9] The court of appeals asserted that "[t]here was no direct evidence or evidence from which it could properly be inferred that any other oil company refused to refinance Champion and accept it as a distributor because of the existence of the lease/leaseback agreements" (11a). The court there could have only been addressing the question of whether competition between major oil companies had been affected; since it had earlier acknowledged that this Court's holding in *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, required it to "view the evidence in the light most favorable to [Champion] and . . . give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably have been drawn." (3a). The record shows that Sinclair refused to release Champion's stations in favor of another supplier (I App. 247) and that in previous years various suppliers were actively interested in affiliation with Champion (II App. 473-75). Indeed Sinclair itself recognized that release of the stations was critical to Champion's ability to secure another supplier (PX 35, III App. 35). Thus, the jury could have properly concluded that release of the stations was an essential condition to Champion's financial recovery and that Sinclair's refusal to release the stations had destroyed Champion's ability to compete as the distributor for one of Sinclair's competitors. Moreover, the district court correctly observed that this inference was supported by Douglass' testimony to the effect that no oil company would seriously consider Champion as a jobber with its stations thus encumbered (17a-18a). In view of the fundamental principle which the court of appeals had explicitly recognized, its assertion could not have been intended to be taken literally.

[10] The absence of coercion on the part of Sinclair, found by the district court "at the outset" of the relationship to have been undisputed (I App. 192-93), does not preclude a finding that Sinclair at that time possessed an anticompetitive animus; nor is it dispositive on the question of leverage coercively exercised by Sinclair, in exploiting the constituent contracts at subsequent times.

Champion's solicitation of affiliation with Sinclair and ability to

Accordingly, the court of appeals' exclusive evidentiary focus upon supplier foreclosure at the regional level — arguably appropriate for evaluation of the annually renewable distributorship agreement alone, *see Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) — was far too simplistic an approach to the long course of dealings involved in the instant case.

As noted, *ante* at n. 10, the leaseback cancellation provisions were recognized in the industry as appropriate to protect a particular legitimate interest and therefore not inherently unreasonable. The relation between a restraint and valid business interest is a well recognized component of the rule-of-reason inquiry. In the classic statement of the rule quoted by then Circuit Judge Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899):

> "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether

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secure certain contractual provisions is no bar to challenging terms which Champion neither sought nor could have reasonably expected Sinclair to enforce under the circumstances as they later developed. *See Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968). Douglass' testimony, based upon some 30 years experience in the industry, was that since the lease/leasebacks were strictly financing instruments which enabled the mortgagee-bank to look to Sinclair's far more substantial assets as security on the fully financed mortgages, Sinclair had no legitimate reason to exercise the leaseback cancellation clauses and refuse to release the properties if Champion secured another company to assume Sinclair's purported derivative obligation to the lending institutions. (I App. 247-248) Douglass was therefore justifiably "a little bit aghast" at their refusal and expected to find "somebody who would know what [he] was talking about." (I App. 248).

> the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is in the eye of the law, unreasonable."

However, such protection is not to be judged in a vacuum for "the problem is not simply whether some justification may be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in the light of the extenuating interests." *White Motor Co.* v. *United States,* 372 U.S. 253, 270 (1963) (Brennan, J., concurring). Accordingly, the restraints became unreasonable when they were employed by Sinclair, not for those valid reasons, but as devices to penalize Champion for its purchases from alternate suppliers and, ultimately, to remove Champion as an effective competitive force in the Butler County market.

Sinclair's coercive and unreasonable use of the contracts involved to assure its "control" over Champion's gallonage, in addition to providing this evidence of unreasonable effect through the impairment of Champion's freedom to select its suppliers on the basis of independent business judgment, amply demonstrates Sinclair's anticompetitive purpose.[11] Accordingly,

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[11] Evidence that the effect of the arrangements was to unreasonably restrain trade is, in itself, sufficient to support the jury's determination that Sinclair violated Section 1 of the Sherman Act; concommitly, a showing that this facially reasonable restraint was "accompanied with a specific intent to accomplish a forbidden re-

the court of appeals' disregard of evidence bearing on coercion and justification for the restraint flawed their rule-of-reason inquiry on both issues. In resolving the business justification question, one "pertinent inquiry would explore the availability of less restrictive alternatives." *White Motor, supra,* 372 U.S. at 271. Of course, use of a restrictive provision when less restrictive alternatives are available may prove not only that the chosen provision is more restrictive than necessary but also that the purpose for its selection was not a legitimate one. This inquiry too escaped the court of appeals' attention, for it ignored the abundant evidence concerning Sinclair's conduct in August 1965, after it had turned down Champion's request for a loan. At that time Sinclair considered four alternative proposals to remedy Champion's financial problems (P. Ex. 35, II App. 33). One of the alternatives, purchase of all the Champion assets, would have given Sinclair all of the business and would have taken care of Champion's indebtedness without tying up Champion's remaining worth. Moreover, cancellation of the base leases and retiring Champion's debt would have protected Sinclair, but this was rejected because "[t]his would put us [Sinclair] out of business in the Hamilton area." (P. Ex. 35, III App. 35).

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straint" would also support the verdict. *See Times Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 614 (1953). Contracts may be found illegal when an unreasonable restraint of trade is either their object or effect. Id. However, as with the issue of coercion, proofs are not so neatly severable into "effect evidence" as opposed to "purpose evidence"—evidence generally bears on both questions and proof of one supports an inference of the existence of the other. In the instant case, we need not make this virtually metaphysical determination, for there was ample evidence from which the jury could have found both an anticompetitive purpose and an anticompetitive effect.

Another alternative was a partial purchase, that is, purchase of some of Champion's properties. Sinclair officials recognized that this alternative would have left Champion in control of the remaining stations: "If we purchase the service stations and resume lease obligations of those stations we control by underlying lease, there is nothing to preclude Champion from obtaining additional re-financing from a competitor and consequent change of supplier." (P. Ex. 45, III App. 49, 51). The jury could have inferred that one or more of these less restrictive alternatives was feasible from a financial standpoint and that Sinclair chose the most restrictive device in order to control Champion's gasoline and fuel oil business. This inference is virtually compelled by the abundant evidence which directly reveals Sinclair's purpose throughout the critical 1965-68 period.

When Champion's financial problems began to heighten in 1965, Sinclair placed Champion on a C.O.D. basis; Champion had no alternative but to purchase 98% of its product needs from Sinclair's competitors who were willing to provide Champion with credit (I App. 128, 298, 332). Sinclair's representatives were quite concerned that Champion was making substantial purchases of petroleum products from Sinclair competitors (Tr. 371-372). Sinclair was unwilling to tolerate this situation and was anxious to take whatever steps were necessary to correct this problem (I App. 332; Tr. 372-374). Sinclair's concern could not have been directed towards the quality of the competing product since in the past Sinclair had directed Champion to pick up product, for resale under the Sinclair brand, at competitors' terminals whenever it suited Sinclair (I App. 242-243).

Following Sinclair's action in refusing Champion's requested loan, Sinclair's own documents reveal a consistent predatory motive which was corroborated by their relentless takeover of Champion's business. There was extensive evidence that Sinclair's primary concern was to gain control of the Champion volume and to preclude Champion from going to a competing supplier (P. Ex. 41, III App. 44, 48; P. Ex. 45, III App. 49, 51). The first step in accomplishing its goal was the takeover of four retail stations owned by Champion and covered by the lease/leaseback arrangements. If Champion was unwilling to accede to the takeover, Sinclair was prepared to take over all of the stations and operate them on a direct basis (P. Ex. 46; P. Ex. 48, III App. 52; Tr. 403-404). However, this first maneuver did not achieve control over all the Champion volume. Therefore, in 1967 Sinclair converted Champion to a commission marketer arrangement with the purpose and intent of gaining control over approximately six million gallons of product under the Champion umbrella (P. Ex. 51, III App. 51, 58; P. Ex. 53, III App. 59, 61).

Shortly after the commission marketer arrangement had been instituted, Sinclair converted Champion to a salaried personnel operation and rejected Champion's request to be released from the lease/leaseback arrangements (I App. 374; Tr. 169-70). The reason for this conversion was because "this volume could be diverted from our company by Mr. Douglass . . . ." (P. Ex. 57, III App. 64, 65).

Sinclair was very effective in achieving its goal of gaining control over the Champion volume. Indeed, one of the key figures behind Sinclair's maneuvers commended the Sinclair management for its support

since Sinclair had acquired "control" over "certain volume on a direct basis at no cost to our company" (P. Ex. 54, III App. 62, 63).

Confronted with the substantial evidence of Sinclair's anticompetitive intent during the period 1965-68, the jury could have reasonably inferred that Sinclair had initiated its relationship with Champion in 1958 with that purpose, thereby satisfying the court of appeals' apparent insistence that there be temporal coincidence of intent and contract. Accordingly, their special verdict finding that Sinclair had entered into the contracts with the purpose and intent to foreclose competition was not, as the court of appeals viewed the matter, devoid of evidentiary support. Indeed, its conclusion is reinforced by proof which linked Sinclair's intent during the latter period with Sinclair's purpose in establishing the contractual relationship with Champion (I App. 269, 332, 397-398).

As we have demonstrated above, the court of appeals fundamentally misconceived the broad inquiry demanded by the antitrust laws by insisting that Champion could not prevail without proving that Sinclair's major integrated competitors also felt the force of the blows which crushed Champion. This insistence was singularly inappropriate in light of the evidence which showed Sinclair's deliberate and coercive exploitation of ostensibly reasonable instruments to achieve its unlawful end. Unless set aside by this Court, the decision below gives major integrated oil companies license to utilize conventional land-financing and other long-term instruments to purposefully impose their will on local independent marketers and destroy those who insist upon their independence. Such practices are not legalized merely because the mark-

eter's affiliation was not totally valueless.[12] The antitrust laws forbid such practices, sanctioned by the court of appeals, which enable major integrated suppliers to present independent marketers with the bleak choice of taking product exclusively from the supplier throughout the duration of these long-term instruments or becoming landlord to someone who will. The need for this Court's intervention is underscored by the explicit Congressional recognition that

> "the independent branded and non-branded distributor[s] of refined petroleum products . . . have an importance to the United States economy far out of proportion to their market shares, because they continually spur the major integrated firms to improve their own efficiency in the production, refining, transportation and marketing of products." H. R. Rep. No. 93-531, 93d Cong., 1st Sess. 18 (1973). *Accord,* S. Rep. No. 93-159, 93d Cong., 1st Sess. 24 (1973).[13]

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[12] After asserting that "[t]he estate-building features of the lease/leaseback arrangement appear to have been the chief reason for Champion's decision to affiliate with Sinclair," the court of appeals noted that Champion had received Sinclair's rental payments under the base leases and had built up equity in the leased premises (11a). The fact that Champion "enjoyed" the prospect of eventually owning the properties after paying insurance, maintenance, and taxes over the term of the respective mortgages is irrelevant to the basic question of whether the arrangement unreasonably restrained trade.

[13] This concern was expressed in the specific context of assuring adequate supplies of product to this sector of the industry during times of shortage. Accordingly, Congress directed that the allocation regulations mandated by the Statute must "to the maximum extent practicable . . . preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers." Emergency Petroleum Allocation Act of 1973, § 4(b)(1)(D), 15 U.S.C. § 753(b)(1)(D) (Supp. III 1973).

Specific statutory protection of the independent sector of this industry from one form of predation should not be undermined by judicial hobbling of the full sweep of the Sherman Act's more general proscription of practices designed to achieve the same ends.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1974

No. 73-1835

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMPION OIL SERVICE COMPANY, *Plaintiff-Appellee,*

v.

SINCLAIR REFINING COMPANY, SINCLAIR OIL CORPORATION and ATLANTIC RICHFIELD COMPANY, *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed August 29, 1974.

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

LIVELY, Circuit Judge. In this private antitrust action the jury assessed damages of $989,457, which amount was trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and judgment was entered in favor of the plaintiff for $2,968,371. On appeal it is claimed that the district court erred in failing to grant a directed verdict in favor of the defendants, in failing to make requested rulings on damage issues, in failing to instruct the jury on the defense of *in pari delicto* and, following the verdict, in denying the motion of the defendants for judgment notwithstanding the verdict.

Between 1946 and 1958 Champion Oil Service Company (Champion) had grown from a single service station to a successful independent marketer of petroleum products with an annual volume of over 5,000,000 gallons in Butler County, Ohio. Champion was able to sell petroleum products

which were supplied by various oil companies under its own brand name at full prices in competition with nationally advertised brands. By 1958 Champion operated two bulk plants and twelve service stations in addition to servicing farm and commercial accounts and heating fuel oil customers. The principal officer of Champion was Glenn E. Douglass, its founder and the chief witness for Champion. Douglass testified that, although the business was successful, it had always operated in a tight working capital state. By 1958 Douglass perceived that the use of credit cards was becoming more widespread and that the highway building program would require an aggressive marketer of petroleum products to establish service stations at new locations. He testified that he felt he would be able to serve his area better if he were affiliated with one of the national oil companies.

Sinclair Refining Company was the marketing subsidiary of Sinclair Oil Corporation during the time relevant to this controversy. Subsequently there was a merger involving Atlantic Richfield Company, another defendant in the action. The defendants will be referred to collectively as Sinclair. Although Sinclair had operated for some 20 years in Butler County, Ohio prior to 1958, it had always been a substandard marketer with poor public acceptance in the area. In 1958 Champion had about 39 per cent of the independent jobbers' market in gasoline in the Butler County area and 48 per cent of the jobbers' market in fuel oil. This represented approximately 88 per cent of unbranded gasoline business in the area and 94.5 per cent of unbranded fuel oil business. Because of the strong position of Champion, representatives of a number of oil companies called on Mr. Douglass in 1958 suggesting affiliations between Champion and their employers. Douglass testified as to the decision to go with Sinclair, "We sort of selected them." He described various considerations which went into his decision to affiliate with Sinclair, but spoke primarily of the appeal of Sinclair's "estate building type of lease and

leaseback." Under this program a Sinclair distributor could obtain financing to purchase land and build an equipped service station primarily on the basis of a long-term lease to Sinclair at a rental which covered the full cost of the property, improvements and fixtures.

Champion and Sinclair entered into a contract by which Champion became the Sinclair distributor in Butler County, Ohio for a period of one year beginning April 1, 1958 and continuing from year to year thereafter for a term not to exceed ten years, subject to the right of either party to terminate upon 60 days notice prior to any contract anniversary. Thereafter one existing station and six new service stations were leased to Sinclair for terms of 15 years. Each of the new stations was owned by Champion and was financed with a one hundred per cent bank loan covered by a 15-year mortgage that was coterminous with the lease to Sinclair. The rent which Sinclair agreed to pay Champion for each of the stations was the exact amount required to pay off the mortgage loan and the rents under each lease were assigned to the lending institution as additional collateral for the loan. These are referred to as base leases. Each base lease contained the following provision:

> If at any time during the term hereof Lessor [Champion], or, if there be more than one, any Lessor, shall be indebted to Lessee [Sinclair] on any account whatsoever, it is agreed that Lessee shall have the right to apply any accruing rental on said unpaid indebtedness, and that any amount so applied shall constitute rental payment hereunder.

Simultaneously with the execution of each base lease, the parties entered into a "station lease" by which Sinclair leased the same property back to Champion for a period of 15 years. The rent to be paid by Champion to Sinclair under the station lease was exactly the same as that due from Sinclair to Champion under the base lease. Cham-

pion as the owner of the stations had the obligation to pay taxes and insurance and at least part of the maintenance costs. Douglass testified that it was anticipated that these expenses would be paid out of the profits which Champion would realize in operating the stations under the sublease or station lease. Each station lease provided, however, that in the event of a termination of the distributor agreement between Sinclair and Champion "then Lessor shall have the option of cancelling and terminating this Lease by written notice to such effect to Lessee." Counsel for Champion examined and approved all of these documents.

Despite its adoption of the Sinclair brands and emblems and the expansion to new outlets, Champion did not increase its gallonage in proportion to its growth in capital commitments and operating overhead. In fact, its small profits turned into losses and its operating costs continued to climb. By 1963 Champion was seeking a means of refinancing its operations, and Glenn Douglass testified that use of the equity which had built up in the financed service stations was necessary to achieve any relief by way of refinancing. Eventually Douglass requested that Sinclair make a loan to Champion of approximately $700,000, with the proceeds being used to pay off all existing bank mortgages on station properties and other obligations of Champion and providing $50,000 of working capital. Douglass testified that after a number of sessions with various representatives of Sinclair he was advised in August 1965 by Harry Young, the regional manager of Sinclair, that the loan would not be made. The witness testified that he told Mr. Young in the same conversation that since the loan would not be made Champion requested that it be released "from all of our documents, our leases and our sales contracts so I could take this package elsewhere and survive." He states that Harry Young told him that "[H]e would not do that" and that this was the end of the conversation. Later another representative of Sinclair suggested that Champion turn over to Sinclair ten

of the stations which it was operating. These were the six original Sinclair stations and four of Champion's financed stations. This was eventually done and the release of the four owned stations plus the sale of equipment and merchandise in all ten reduced the rental load and provided Champion with cash which it needed to pay off some of its pressing obligations.

In January 1966 Champion served notice of its intention to cancel the distributor supply contract effective at the end of March of that year. Douglass testified that he contacted a number of other oil companies with the idea of obtaining financing from one of these companies and in turn becoming its distributor. He said that he "felt" that some supplying company would be interested in taking over the leases and the bank loans and stepping into Sinclair's shoes. On the other hand, he testified that if this were not possible, he was interested in selling the seven Champion-owned stations to someone as an investment and tying up with another oil company "like Sun" so that Champion could pay a better rental to the investor-purchaser. Champion continued to operate as a jobber-distributor of Sinclair products on a month-to-month basis after the termination of the distributorship contract. During this time it continued to operate the three remaining financed stations. Sinclair continued to pay the rent on the four Champion-owned stations which it had taken over, and the equity of Champion in the seven stations continued to increase. Although Douglass testified on one occasion that he could not get financing because the money market was tight, it was his thesis throughout his testimony that the refusal of Sinclair to release the base leases on the seven financed service stations prevented Champion from salvaging its business. This assertion was based on the witness' opinion after a lifetime in the business of distributing petroleum products that no other oil company would finance him so long as Sinclair controlled the desirable locations represented by the seven financed stations. His son testified to the same effect.

On cross-examination it was brought out that, except for financial resources, Champion was stronger than Sinclair in relation to the distributorship arrangement entered into in 1958. Sinclair had never done well in Butler County, Ohio and Champion was a major factor in the independent sector of the petroleum business of the area. This was emphasized by evidence that Champion had insisted on ten conditions being met by Sinclair prior to agreeing to become a Sinclair distributor. Later, when Champion was trying to make a change, both Cities Service Company and Sun Oil Company declined Champion's requests for financial assistance because of its burdensome debt structure and unprofitable operating experience without reference to the refusal of Sinclair to release the base leases on the seven service stations. It was testified that Champion purchased petroleum products from Tresler Oil Company at Cincinnati during the entire time that it was a distributor of Sinclair products and that some sort of financial help was offered by Tresler. Douglass admitted that he had put second mortgages on all of the financed service stations, but stated that Champion had not realized capital, but had used these mortgages to secure prior indebtedness. At one point near the end of Champion's relationship with Sinclair, Champion was purchasing 98 percent of the petroleum products which it sold from suppliers other than Sinclair. Sinclair had put Champion on a C.O.D. basis while other suppliers in the territory were still willing to sell to Champion on credit. Douglass admitted that the Ohio manager of Sinclair told him to find another supplier and that he "assumed" that there would be an agreement freeing the three remaining service stations from the base lease to Sinclair.

Glenn Douglass testified that he did not blame Sinclair for financial problems of Champion, but his complaint was that Sinclair's refusal to release the base leases prevented Champion from using its own properties to extricate itself from its financial difficulties. It was stated that increased

gallonage was the only way that Champion could salvage its business. The fixed charges and operating costs would not increase with greater gallonage, and the profits would improve dramatically according to witnesses for Champion. Douglass testified that Sun Oil Company was second in Ohio in the marketing of petroleum products and that if Champion had been able to borrow $350,000 it would have been able to enter into a distributorship with Sun which would have been profitable enough to have enabled it to salvage its operations. While Douglass maintained that the needed $350,000 would have been available except for the base leases to Sinclair, the Sun Oil Company employee who had negotiated with Douglass was not asked if these leases stood in the way of Sun's competing for the Champion business.

The district judge required extensive pretrial proceedings and these effectively narrowed the issues in the case. The court granted partial summary judgment in favor of Sinclair which removed from the case issues based on alleged *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. He also ruled that the requirements contract between Champion and Sinclair, standing alone, could not be treated as a violation of the antitrust laws since there was no claim of any causal connection between the plaintiff's asserted damages and this contract. As the evidence showed, Sinclair never insisted that Champion purchase all its requirements from Sinclair. In the opinion issued in connection with the summary judgment ruling the district court stated that the only issues for the jury "are whether or not the leaseback, either alone or in combination with the lease and requirements contract, constituted an unreasonable restraint of trade under § 1 of the Sherman Act; and also whether or not the combination between Sinclair and Champion is an unreasonable restraint of trade under § 1 of the Sherman Act." The plaintiff has not appealed from the partial summary judgment.

The first question to be answered on appeal is whether Sinclair was entitled to a directed verdict on the ground that Champion failed to prove a prima facie case of unreasonable restraint of trade within the meaning of § 1 of the Sherman Act. In denying Sinclair's motion for a directed verdict the District Judge remarked:

> I don't want you to get your hopes up just because the case is going to a jury. I will be very frank with you. I don't see any evidence of intent to injure competition. I don't see any evidence of unreasonable restraint of trade, and I see no evidence on which a jury could properly base a verdict on the issue of causation.

In considering a district court's denial of a directed verdict and judgment notwithstanding the verdict we must "view the evidence in the light most favorable to [Champion] and . . . give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Company* v. *Union Carbide & Carbon Corporation*, 370 U.S. 690, 696 (1962); *Fortner Enterprises, Inc.* v. *United States Steel Corporation*, 452 F.2d 1095 (6th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972). Sinclair contends that since there was no *per se* violation of the Sherman Act the "rule of reason" controls and that under this rule there must be a showing of an adverse impact on the market place for otherwise legal acts to be held to constitute unreasonable restraint of trade. Reliance is placed on *Elder-Beerman Stores Corporation* v. *Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972). In *Elder-Beerman*, we were dealing with a claim that exclusive supply agreements between a supplier and a seller were used in an attempt to monopolize the department store business in Dayton, Ohio. The majority of the court panel held that the plaintiff failed to establish the single conspiracy upon which it had based its claim for damages. If Champion's claim in the present case were based solely on the exclusive supply arrangement between

it and Sinclair, *Elder-Beerman* might require reversal. However, Champion claims that the unreasonable restraint of trade did not result from the requirements contract alone and the district court so ruled in granting partial summary judgment. It is the position of Champion that it was the intention of Sinclair to control Champion's portion of the Butler County petroleum products business by obtaining 15-year leases on Champion's prime service station sites, which leases had no escape clause, while at the same time leasing the stations back to Champion under an instrument which provided that the leaseback could be cancelled upon termination of the distributorship agreement. This intention was realized, says Champion, when Sinclair refused to release the stations, making it impossible for Champion to deal with a Sinclair competitor. Thus there are factors in this case which require us to look beyond *Elder-Beerman* and other cases dealing with exclusive supply agreements.

Sinclair also cites *Fortner Enterprises, Inc.* v. *United States Steel Corporation, supra,* a case dealing with a "tying arrangement." The district court correctly held that this is not a true "tying" case, and this question is not before us since there was no appeal from the partial summary judgment.

Further reliance is placed on this court's opinion in *Ace Beer Distributors, Inc.* v. *Kohn, Inc.,* 318 F.2d 283 (6th Cir.), *cert. denied,* 375 U.S. 922 (1963). Champion responds that this case involves much more than a refusal to deal with a party who desires to be a customer of the manufacturer, which was the basic complaint in both *Elder-Beerman, supra* and *Ace Beer, supra.* Champion maintains that the inherent perniciousness of the lease/leaseback/distributorship arrangement is evidenced by the fact that the only terms under which it could sever relations with Sinclair left it stripped of control over the financed service stations, without which it was impossible to deal with a Sinclair competitor.

Sinclair relies upon *Apex Hoisery Co.* v. *Leader*, 310 U.S. 469 (1940), where the Supreme Court held that the Sherman Act never applies unless there is some form of restrain upon commercial competition in the marketing of goods or services. The purpose of the Act was stated by the Court in this language:

> The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commerical transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . 310 U.S. at 493.

In addition Sinclair cites *Cartrade, Inc.* v. *Ford Dealers Advertising Association of Southern California*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972), for the proposition that where there is no evidence that a decision to terminate a relationship is made for anti-competitive reasons the complaining party has failed to prove a prima facie case of violation of the Sherman Act.

Sinclair contends that Champion's failure to secure a distributorship with another oil company could not possibly have affected competition because at least 17 oil companies were operating in Southwestern Ohio, the area Sinclair maintains should be considered rather than just Butler County. The total gallonage for the area in 1965 was 611,376,907. Champion's total gallonage for 1965-66 was considerably less than one percent of the total. In *Tampa Electric Company* v. *Nashville Coal Company*, 365 U.S. 320, 327-328 (1961), the Court held that three determinations are necessary for finding that an exclusive dealing contract or arrangement constitutes an antitrust violation. It was said that the court must determine the line of commerce involved, the area of effective competition and that the competition foreclosed by the arrangement constitutes a substantial share of the relevant market. Sinclair main-

tains that there was no showing of any substantial effect on the relevant area of effective competition and for this reason the case should not have been submitted to the jury.

We conclude that the district court should have granted Sinclair's motion for a directed verdict. There was no direct evidence, or evidence from which it could properly be inferred, that any other oil company refused to refinance Champion and accept it as a distributor because of the existence of the lease/leaseback agreements. To the contrary, the evidence is overwhelming that the refusals were based on the poor financial condition of Champion and its inability to reduce operating expenses—the very considerations which caused Sinclair to put it on a C.O.D. basis. The estate building features of the lease/leaseback arrangement appear to have been the chief reason for Champion's decision to affiliate with Sinclair. During the entire time of deteriorating relations between the parties Sinclair continued to pay rent on the seven stations which Champion owned and had financed through the arrangement of which it now complains. For a portion of the time four of these stations were being operated by Sinclair rather than Champion, but Champion was building equity in them. Because of this growth in equity Champion was able to secure some financial relief by placing second mortgages on this real estate which had originally been encumbered with mortgages representing its full value.

The district court correctly determined that there was no *per se* violation of the Sherman Act and that the case did not involve an illegal tying arrangement. We find that there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade. Such proof is required in non *per se* cases. Because of our disposition of this issue we do not reach other questions which the parties have argued on appeal.

The judgment of the district court is reversed and the cause is remanded with instructions to enter judgment notwithstanding the verdict dismissing the complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Caption Omitted in Printing]

Opinion and Order on Motion for Judgment Non Obstante Veredicto and in the Alternative for a New Trial

(Filed May 10, 1973)

In this interesting case there have been many motions. The "big one" prior to trial was defendants' motion for a summary judgment, which was partially granted, and the Court decided that the only issues for the jury were whether or not the leaseback, either alone or in combination with the lease and requirements contract, constituted an unreasonable restraint of trade under § 1 of the Sherman Act; whether or not the combination between Sinclair and Champion was an unreasonable restraint of trade under § 1 of the Sherman Act.

We refer to this for a background statement helpful to an understanding of the case.

Also there is a lengthy stipulation which gives the background summarized in the Court's decision partially granting the motion for summary judgment.

The case went to trial before a jury and resulted in a verdict for the plaintiff. Now we have to decide defendants' motion for judgment notwithstanding the verdict and, in the alternative, defendants' motion for a new trial.

We consider the issue on a motion for judgment notwithstanding the verdict the same as on a motion for a

directed verdict at the close of all the evidence. In considering a motion of that nature—

> "... the trial judge must view the evidence in the light most favorable to the plaintiff and must make all permissible inferences in favor of the plaintiff. Domany v. Otis Elevator Company, 369 F.2d 604 (C.A. 6), cert. den., 387 U.S. 942. . . ." *Teti* v. *Firestone Tire and Rubber Company,* 392 F.2d 294, 297 (1968).

A motion for a directed verdict was made at the close of plaintiff's evidence and at the close of all the evidence and was overruled. Such a motion is an absolute prerequisite to a subsequent grant of judgment *non obstante veredicto.* Wright, Law of Federal Courts (2d Ed.) page 424.

The motion for judgment *n.o.v.,* like the motion for directed verdict, raises only the legal question whether there was enough evidence to make an issue for the jury. *Id.* The motion for judgment *n.o.v.* must be denied if there is any substantial evidence supporting the verdict.

> "The credibility of witnesses and weight of the evidence, proper considerations on a motion for new trial, are not the concern of the Court on motion for a directed verdict or for judgment n.o.v. The evidence must be viewed in the light most favorable to the party against whom the motion is made, he must be given the benefit of all legitimate inferences which may be drawn in his favor from that evidence, and the motion must be denied if, so viewed, reasonable men might differ as to the conclusions of fact to be drawn." *Id.,* p. 425.

Though I have no authority at my fingertips for saying so, I think it is accurate to say that any request to disturb a jury verdict in a complex case such as this should be approached with extreme care. I think it is appro-

priate to add this is especially true in this case for several reasons. For one, the case was tried to a "blue-ribbon" jury by agreement, that is, it was tried to a jury of six picked from a panel selected other than at random by counsel because of the qualifications by education and/or experience of the members selected. Also, it will be seen that the jury was extremely conscientious in the performance of its duties. For instance, after retiring to consider the issue of damages the first request of the jury was for an adding machine. It worked in excess of two days and voluntarily left an explanation of how it arrived at its verdict. Such explanation would meet the requirements of answers to interrogatories.

Next, it is in order to note that prior to trial and from the outset the procedures recommended for the handling of complex cases were followed, and, pursuant to the pretrial order following the third pretrial conference, the plaintiff was ordered to and did file a detailed written pretrial brief consisting of a narrative statement of *all* facts proposed to be proved by the plaintiff and concise statements of its legal contentions. The defendants were required to indicate which averments of the plaintiff they admitted and which they denied and were required to give an exhausive statement of all of their affirmative matters.

This laid the groundwork for an extensive stipulation and a copy of this was placed in the hands of each juror at the outset of the case and was with them throughout. (They could even take it home.) So they were well grounded in the background of the dispute. In addition, the jury, by agreement again, was instructed along general lines at the outset of the case so that they could better follow the evidence and fit it into place. They were instructed additionally at the conclusion of all the evidence. Then they were given special verdicts on the liability question and answered them favorably to the plaintiff

after lengthy deliberations. Finally, it is to be noted that in arriving at an amount of damages the jury's explanation shows that they bought the plaintiff's argument that but for the antitrust violation the plaintiff would have become an agent or distributor of Sunoco, including ten stations which Sunoco owned but discounted plaintiff's evidence about the profit it would have made as such distributor.

In short, the jurors were hand-picked, every attempt was made to inform them appropriately as to the facts and the law, and they were extremely conscientious in the performance of their duties.

While one may confess surprise at the jury's verdict, and though it begs the question before the Court, one must respect it and the skill with which the case was presented on both sides. The question, of course, is whether there was enough evidence to make an issue for the jury. Professor Wright cautions us that unfortunately there is no sure test to determine the legitimate inference to which plaintiff is entitled from the evidence. Also—

> "In determining whether there is a submissible issue, it is not settled whether the court is to look only to the evidence favorable to the party against whom the motion is made, or whether it is to consider all the evidence." Wright, Law of Federal Courts (2d Ed.), page 425.

Finally, Professor Wright says consideration must be given to the controversial F.E.L.A. cases and Jones Act cases *re* sufficiency of the evidence and the powerful argument against confining them to F.E.L.A. and Jones Act litigation. These cases refer to " 'the jury's historic function' and to the Seventh Amendment. . . ." *Id.*, page 426.

These cases have been cited by the Supreme Court itself as representing the " 'federal test of sufficiency of

the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship.'" *Id.*, page 427. "For these reasons other courts and commentators have held the test laid down in the F.E.L.A. cases applicable in all cases." *Id.* page 427.

Our analysis leads to the conclusion that in the Sixth Circuit the F.E.L.A. standard is the federal standard. We have not overlooked that in footnote 4, page 919, in *Lones* v. *Detroit, Toledo and Ironton Railroad Company,* 398 F. 2d 914 (6 Cir., 1968) the Court indicated as "apt" the resolution of the question by the Fifth Circuit in *Planters Manufacturing Co.* v. *Protection Mut. Ins. Co.,* 380 F.2d 869 (5 Cir., 1967). And also that the Fifth Circuit overruled *Planters* in *Boeing Company* v. *Shipman,* 411 F. 2d 365, at 372 (1969). But the Sixth Circuit did not follow suit when faced most recently with the question of sufficiency. *Blue Diamond Coal Co.* v. *United Mine Workers of America,* 436 F.2d 551 (6 Cir., 1970). As we read this the Sixth Circuit adheres to its decision that the F.E.L.A. standard is the federal standard for sufficiency of evidence for a motion for judgment *n.o.v.*

Only recently the Court held:

> "Judgment notwithstanding the verdict is not proper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. It should not be granted if there is a conflict in the evidence, and credibility of evidence is not to be considered in passing on a motion for judgment. Greer v. United States, 408 F.2d 631 (6 Cir., 1969); Moore's Federal Practice, Par. 20.07(2) (Second Edition)." *Reeves* v. *Power Tools, Inc.,* 474 F.2d 375 (Feb. 22, 1973, 6 Cir.).

We only consider it necessary to discuss whether there were substantial questions on the issues of impact and intent.

During the trial the Court expressed reservations as to the sufficiency of the evidence on intent but the matter called to attention in plaintiff's final argument changed the Court's mind on that subject. I now believe there was sufficient evidence on the issue of intent.

As to impact or fact of damage, there is clearly evidence from which the jury could legitimately infer that as a result of the antitrust violation the plaintiff lost the gallonage which was the nucleus of its business, and this result was intended by the defendant. Plaintiff showed it was once successful and claimed it could have put its house in order but for antitrust violation, *i.e.*, but for being prevented from "taking his stations elsewhere." It could not have sold the stations because then it would not have had any stations to "take elsewhere." While there is no evidence that any bank or financial institution, or company, for that matter, refused a loan to Champion because the stations were encumbered, Mr. Douglass testified that there wasn't any use in talking to them because they wouldn't even talk to him with the stations encumbered as they were.

The plaintiff kept banging away at its point that it had salvage value and that "but for" the antitrust violation it could have worked out its financial problem if it had a supplier whose product had 89-110% better public acceptance than Sinclair. It was required to show to a reasonable certainty that but for the leases it would have been able to become a distributor of such a supplier. The Sunoco representative testified in a way from which the jury could infer that if plaintiff could raise $350,000 so as to put its financial house in order it could have become a Sunoco representative as it had in fact been at one time. The witness was not asked by the plaintiff or the defendants whether Sunoco was foreclosed from competing for Champion's gallonage because of the seven leases. While the Court indicated at the time out of the hearing

of the jury that it would conclude on that state of the record that plaintiff did not ask because the answer would be adverse, the Court cannot conclude that the jury's special verdict finding there was impact is not supported by substantial evidence.

Months have been consumed in the preparation for and trial of this case, though it was tried on the issue of liability in the remarkably short time of seven days as a result of the cooperation of counsel in preparing the stipulation and their restraint in the examination of witnesses. We believe that during the course of that time the other questions raised by the defendants in their motion for a judgment *n.o.v.* were considered and passed on, so for that reason, we do not extend the discussion to include all of the many points raised by the defendants.

The Court's conclusion is that the motion for judgment *n.o.v.* is not well taken, and it is therefore denied. The alternative motion for a new trial is likewise denied.

It is so ordered.

/s/ David S. Porter
David S. Porter
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1835

CHAMPION OIL SERVICE COMPANY, *Plaintiff-Appellee*

v.

SINCLAIR REFINING COMPANY, SINCLAIR OIL CORPORATION and ATLANTC RICHFIELD COMPANY, *Defendants-Appellants*

Before: WEICK, LIVELY and ENGEL, Circuit Judges

Judgment

Appeal from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded with instructions to enter judgment notwithstanding the verdict dismissing the complaint.

It is further ordered that defendants-appellants recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Issued as Mandate: November 8, 1974
COSTS: To be recovered by Appellants

Filing fee	$ 25.00
Printing	$4125.60
Total	$4150.60

Attest:

/s/ JOHN P. HEHMAN
Clerk

Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

October Term, 1974
No. 74-812

CHAMPION OIL SERVICE COMPANY,
Petitioner,

vs.

SINCLAIR OIL CORPORATION,
SINCLAIR REFINING COMPANY
AND
ATLANTIC RICHFIELD COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals correctly determined that the District Court erred as a matter of law in not granting Sinclair's motion for a directed verdict since there was no proof that the contracts and leases complained of were designed to, or in fact did, result in unreasonable restraint of trade.

STATEMENT

A. Proceedings Below

This is an action alleging a violation of the Sherman Act (15 U.S.C. Sec. 1). The complaint was filed by Champion Oil Service Company ("Petitioner"), a wholesale distributor of petroleum products in southwestern Ohio, against Sinclair Refining Company ("Sinclair"), its former supplier of petroleum products.

Petitioner's contention in the District Court was that in late 1965 and early 1966 Sinclair prevented it from extricating itself from a serious financial situation by making an alternative distributorship affiliation with a Sinclair competitor. The alleged means used by Sinclair to accomplish this end was the existence of certain "lease/leaseback agreements" petitioner had entered into with Sinclair beginning in 1958 to enable petitioner to finance the acquisition and development of several retail outlets for its products. Petitioner claimed, therefore, that the lease/leasebacks were entered into by Sinclair beginning in 1958 for the purpose of restraining trade and that they actually had that effect in late 1965 and early 1966 by preventing it from affiliating with a Sinclair competitor.

Prior to trial, the District Court dismissed petitioner's *per se* claims under the Sherman Act and set for jury trial the issue of whether petitioner's claims amounted to a *non per se* unreasonable restraint of trade.

The District Court, although initially expressing equivocation as to the adequacy of petitioner's proof (II, 469)[1]

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1. References to the Appendix of three volumes filed with the Court of Appeals and lodged by Petitioner with this Court will omit the reference "App." and refer only to volume and page.

denied Sinclair's motion for a directed verdict. Sinclair then declined to present any evidence. The jury found for petitioner and set damages at $989,457 before trebling. The District Court denied Sinclair's motion for judgment n.o.v., and entered judgment for petitioner in the amount of $2,968,371 (Pet. App., 12a-18a).[2]

Upon appeal by Sinclair, the Court of Appeals found that Sinclair's motion for a directed verdict should have been granted. The Court held that "there was no direct evidence, or evidence from which it could properly be inferred, that any other oil company refused to refinance Champion and accept it as a distributor because of the existence of the lease/leaseback agreements." (Pet. App. 11a). The Court stated that the evidence was overwhelming that Champion's inability to extricate itself from its financial problems and affiliate with a Sinclair competitor was a result of its own financial ineptitude (Pet. App. 11a). The Court found that "there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade" (Pet. App. 11a). It thereupon instructed the District Court to enter judgment dismissing petitioner's complaint (Pet. App. 12a).

B. Petitioner's "Statement of Facts" Omits Stipulated, Admitted and Undisputed Facts As to Whether the Lease/Leasebacks Actually Prevented Petitioner from Securing an Alternative Distributorship with a Sinclair Competitor.

Petitioner devotes almost sixteen pages of its long petition discussing bits and pieces of evidence relating to (a) the background of petitioner's relationship with Sinclair from 1958 to 1965; (b) petitioner's serious financial

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2. Citations to the appendix to this petition are in the form "Pet. App. ....". Citations to the petition are in the form "Pet. ....".

problems in 1965; (c) discussions in late 1965 between various Sinclair employees as to possible solutions to petitioner's financial problems; (d) discussions between Sinclair employees and petitioner's President, Glenn Douglass ("Douglass") in late 1965 and early 1966 looking to a solution of those problems; and (e) numerous negotiations between September, 1967 and early 1968 involving a mutually agreeable solution to petitioner's deteriorating financial position, and concomitantly, Sinclair's deteriorating market position (Pet. 3-19).

Although this section of the Petition is headnoted as various "steps" in Sinclair's "taking control" of petitioner there is not a word in these sixteen pages related to the basic issue as to whether the existence of the lease/leasebacks *actually* prevented Champion from extricating itself from its financial problems in 1965-1966 by securing a distributorship with a competitive supplier.

The petition completely ignores the following admitted, stipulated or undisputed evidence relating to petitioner's efforts, starting in August, 1965, to secure such an alternative distributorship:

1. In August, 1965, following Sinclair's rejection of a $700,000 loan to petitioner, Douglass felt Sinclair would release the complained of lease/leasebacks "if I could get some other company to take their place with the bank." Therefore, he started to check out all of his old contacts in the oil industry to obtain the financing refused him by Sinclair (I, 82; 247; 294-295).

2. All of the seven financed service stations subject to the complained of lease/leasebacks were *included* in "the package of service stations" Douglass presented to oil companies for their approval of an alternative distributorship (I, 289-292; 300-302; III, 94-99).

3. Douglass began negotiations to obtain financing from The Cities Service Oil Co. ("Citgo") late in 1965.

Based upon the financial information Citgo received from Douglass in early 1966, Citgo prepared a distributor contract which Douglass actually signed on behalf of petitioner sometime prior to March, 1966 (I, 286; 303-304). Citgo's signing of the distributor contract, however, was made contingent upon its credit department approving Citgo granting credit to petitioner totaling $750,000 (III, 94-102). This credit exposure included a $475,000 direct loan by Citgo to petitioner; Citgo assuming the Sinclair leases on three of petitioner's stations financed by Sinclair by the lease/leasebacks, and Citgo granting petitioner open account credit of $50,000 to $75,000 (I, 286-288). In addition *Citgo was to take second mortgages on all of the other properties which were financed under Sinclair's lease/leasebacks if not released by Sinclair* (I, 287, 299; III, 94-99). On March 24, 1966 the credit manager for Citgo, Mr. Gordon Diggle, rejected the loan *because of petitioner's poor financial condition at the time* (I, 287-289; III, 100-102).

4. In the spring of 1966 petitioner's business was also examined by the Fleetwing Oil Co. ("Fleetwing"), an affiliate of The Standard Oil Co. of Ohio, with a view toward Fleetwing financing petitioner and establishing petitioner as a distributor. A "business analysis" of petitioner was performed at the time by Mr. Thomas Balke, a Fleetwing executive in the wholesale department (II, 638-640). Balke rejected any Fleetwing association with petitioner stating that his projections showed that petitioner would be insolvent within two years, and that of the twenty-six jobbers he had evaluated at the time in Ohio, Michigan, Kentucky, Indiana and Pennsylvania "petitioner rated next to the bottom, second from the bottom" (II, 642-643, 646).

5. Another Sinclair competitor, Sun Oil Co. ("Sun") was actually selling petroleum products to petitioner dur-

ing 1965 and 1966 (I, 298). During this time Douglass discussed several alternate methods of financing with the Sun representative in southwestern Ohio, Mr. Daniel O'Brien. These discussions never included how many service stations would be involved in any possible Champion-Sun affiliation, and were not pursued by Sun because petitioner "was financially too deeply involved with other people for Sun to become interested" (I, 289-290; II, 475-476).

6. Still another Sinclair competitor, Tresler Oil Co. ("Tresler") also sold petitioner a large amount of petroleum products "all through the 1960's" and was a large supplier to petitioner in 1965 and 1966 (Ex. K; III, 112-115; II, 650). In late 1965 and early 1966, Tresler and petitioner worked together on an "intensive analysis" of petitioner's business with a view to petitioner selling Tresler brand petroleum products at petitioner's service stations and at five Tresler stations located in Butler County (II, 65-66; Def. Ex. I, J; III, 103-106). In early 1966, as a result of its intensive analysis of petitioner, *Tresler made an offer to petitioner to switch to its brand* and give petitioner financial, promotional and sales aid if petitioner would cut its expenses to the reasonable level expected of a jobber (I, 305-309; Def. Ex. I, J; III, 103-106, II, 612-613). Douglass, on behalf of petitioner, refused Tresler's offer stating:

> "We have a right to choose which way we wanted to go, and chose to go the increased gallonage way rather than disband our organization by laying off people and trimming expenses" (II, 615) and ". . . if I care to go to Tresler today I could probably pick up where I left off, but we did not pursue it, and that's that" (I, 305).

7. Following Champion's January, 1966 cancellation of its distributor agreement with Sinclair, representatives of Sinclair met with Douglass and his sons on February 4, 1966 for the purpose of discussing procedures for orderly dissolving that relationship. Petitioner stipulated prior to trial that *at that meeting Douglass was urged by Sinclair representatives to find another supplier and that he replied that he was optimistic about working out an arrangement with a competitor* (I, 77; 302). No mention was made at the time concerning any difficulty being experienced by petitioner in this regard as a result of the existence of the lease/leasebacks (I, 284-285).

8. On April 7, 1966 V. R. Gordy ("Gordy"), Sinclair's Ohio manager, wrote to Sinclair's Manager of Distributor Sales in Chicago as follows:

> "Mr. Douglass is negotiating with three competitive companies, Citgo, Fleetwing and Tresler. It is anticipated he will finalize a distributor arrangement with one of the three the week of April 11th. Mr. Douglass will then be in a position to pay his indebtedness to our company". (I, 80).

On April 8, 1966, however, Gordy and Douglass had a meeting at which time Douglass told Gordy he had not been able to make a deal with another supplier (I, 83). Thereafter, petitioner elected to sign a distributor agreement with Sinclair cancellable by either party on thirty days' notice (I, 83).

9. This month-to-month distributor relationship between Sinclair and petitioner continued for over a year. During this period and thereafter petitioner turned to banks, financial institutions, and investment companies for possible relief from its poor financial situation. Champion approached a "mercantile company" in Chicago, the Fifth

Third and Central Trust banks in Cincinnati; the Swiss Credit and Swiss Union banks in Switzerland; attempted a merger with the Columbia Oil Co. to be financed by the Fifth Third Bank in Cincinnati; and engaged the George May Company, an international consulting firm, to find sources of refinancing (I, 88, 99, 121-122; 269-270; II, 604-609). *All of these efforts came to naught for various reasons having nothing to do with the complained of lease/leasebacks* (I, 269; II, 607-608).

10. To obtain funds for purposes "other than supply", however, *during this period Champion used the equities in the seven lease/leaseback service station properties which it claims prevented it from securing financial relief to actually obtain second mortgage financing* (I, 299-300).

C. The Court of Appeals Opinion

After viewing "the evidence in the light most favorable to Champion and [giving] it the benefit of all inferences which the evidence fairly supports . . ." (Pet. App. 8a), the Court of Appeals relied upon much of above evidence omitted by petitioner in reversing the District Court and granting judgment for Sinclair.

After discussing at some length the early relations between the parties and the operation of the lease/leasebacks (Pet. App. 1a-4a) the Court of Appeals examined the evidence as to petitioner's attempts to secure an alternative distributorship in late 1965 and early 1966 following Sinclair's rejection of a $700,000 loan to petitioner (Pet. App. 4a-7a). In referring to Douglass' testimony concerning his contacts with Sinclair competitors, the Court concluded that Douglass' assertions that the lease/leasebacks prevented petitioner from securing an alternative distributorship were based upon his "opinion after a lifetime in the business of distributing petroleum products that no other oil company would finance him so long as Sinclair controlled the desirable locations

represented by the seven financed stations." (Pet. App. 5a).

The Court of Appeals then proceeded to discuss the evidence brought out on Douglass' cross examination and noted the following facts admitted by Douglass which contradicted this opinion testimony:

1. That Cities Service Oil Company and Sun Oil Co. declined petitioner's requests for financial assistance because of petitioner's "burdensome debt structure and unprofitable operating experience" without reference to any refusal of Sinclair to release the base leases on the seven service station properties (Pet. App. 6a);

2. That petitioner had purchased petroleum products from Tresler Oil Co. during the entire time it was a Sinclair distributor and that financial help was offered to petitioner by Tresler (Pet. App. 6a);

3. That Douglass admitted that petitioner obtained financial help by placing second mortgages on all of the seven lease/leaseback financed service stations (Pet. App. 6a);

4. That petitioner, at one point, was purchasing 98% of its petroleum products from Sinclair competition (Pet. App. 6a); and, finally;

5. That Douglass admitted that the Ohio manager of Sinclair told him to find another supplier and that he "assumed" that there would be an agreement freeing the three remaining service stations from the base lease to Sinclair (Pet. App. 6a).

After then referring to the legal authorities cited by both parties and concluding that it must "look beyond" cases dealing solely with exclusive supply agreements (Pet.

App. 9a), the Court of Appeals concluded that the evidence was "overwhelming" that the existence of the lease/leasebacks had nothing to do with petitioner's attempt to salvage its business and that it was petitioner's financial condition which prevented it from securing a relationship with another supplier (Pet. App. 11a).

Following a finding that the lease-leasebacks were appropriate conventional land financing instruments, and, after again emphasizing that petitioner had actually obtained some financial relief by using the equity built up by Sinclair's continuing rent payments, the Court of Appeals held that "there was no proof that the contracts and leases complained of were designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade" (Pet. App. 11a).

ARGUMENT

A. No Important Question of Federal Law, or Conflict Among the Circuits, or Conflict with the Decisions of This Court Is Involved Here

The petition merely attempts to obtain a trial *de novo* after the evidence failed to establish the elements of an antitrust cause of action. Petitioner attempts to accomplish this through its contention that the Court of Appeals "improperly compartmentalized" the evidence in reversing the judgment of the district court and dismissing the complaint. No important federal question is involved. Nor is there any conflict with any decision of this Court.

This Court has repeatedly held that it will not grant certiorari "to review the evidence or inferences drawn from it". See, e.g. *General Talking Pictures Corp. v. West-*

ern Electric Co., 304 U.S. 175, 178 (1938). Yet this is the precise function which petitioner now asks this Court to perform.

Since any review here would necessarily relate only to the limited factual situation presented by the petitioner and would not enlarge on any question of substance that has not already been decided by this Court, we respectfully submit that the petition should be denied.

B. The Court of Appeals Correctly Determined, After Following the Proper Standards in the Consideration of the Evidence, That the District Court Erred As a Matter of Law in Not Granting Sinclair's Motion for a Directed Verdict

No departure from the accepted and usual course of judicial proceedings is remotely present here. The holding of the Court of Appeals was properly arrived at after a consideration of all of the evidence in its strongest light in favor of petitioner, and after giving petitioner the advantage of every fair inference justified by the evidence. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) (Pet. App. 8a).

Furthermore, there can be no dispute that if the District Court erred in its determination that sufficient evidence existed for the case to go to a jury, that is an error of law correctable by the Court of Appeals. *United States v. Generes*, 405 U.S. 93, 106 (1972); *Bryan v. United States*, 338 U.S. 552 (1950); *Neely v. Eby Construction Co.*, 386 U.S. 317, 322 (1967).

The Court of Appeals, in holding that the District Court erred as a matter of law, fully considered petitioner's contention here that the purpose and effect of the lease

arrangements was to prevent petitioner from extricating itself from its financial difficulties and "salvaging its business" (Pet. App. 5a-6a). Relying upon admissions by Douglass upon cross examination, the Court of Appeals found that the leases had nothing to do with petitioner's problems and that petitioner's inability to extricate itself from its financial problems were based upon its poor financial condition and inability to reduce operating expenses (Pet. App. 6a-11a). The Court of Appeals specifically held as follows:

> "There was no direct evidence, or evidence from which it could properly be inferred, that any other oil company refused to refinance Champion and accept it as a distributor because of the existence of the lease/leaseback agreements. To the contrary, the evidence is overwhelming that the refusals were based on the poor financial condition of Champion and its inability to reduce operating expenses—the very consideration which caused Sinclair to put it on a C.O.D. basis." (Pet. App. 11a).

In the face of this holding by the Court of Appeals it is simply an inexcusable distortion for petitioner to represent to this Court that "the Court of Appeals gave absolutely no consideration to the impact of the challenged practices upon petitioner's freedom to select its suppliers in accordance with its own best business judgment." (Pet. 24-26).

Petitioner's only passing attempt to discuss the actual holding of the Court of Appeals is contained in a footnote on Page 27 of its Petition where it erroneously states that the holding of the Court of Appeals is addressed only to "the question of whether competition between major oil companies had been affected." (Pet. 27, Footnote

9). This statement is apparently based on petitioner's claim that the record contained evidence that (1) in August, 1965, Sinclair refused to release the leases; (2) in previous years suppliers were interested in soliciting petitioner; and (3) in the opinion of one Sinclair employee in late 1965 a release of the stations would be important to petitioner in securing an affiliation elsewhere (Pet. 27, Footnote 9).

The short answer to this contention is that speculations by either Douglass or Sinclair employees as to what other oil companies *might* have done is irrelevant in the face of overwhelming evidence as to what the other oil companies *actually did* in early 1966. What all but one of the oil companies *did*, as the Court of Appeals held, was to refuse to refinance petitioner, or accept it as a distributor, because of its poor financial condition and inability to reduce operating expenses, *not* because of the leasebacks. Furthermore, what these companies did was *not affected* by any "refusal" of Sinclair to "release the leases" in August, 1965.[3] That this is so is conclusively shown by a proposal to petitioner for second mortgages on "unreleased" station properties by at least one competitor (I, 286-288; III, 94-99). The last oil company did *not* refuse financial aid to petitioner but made a *specific offer of a distributorship to petitioner* without any reference at all to the lease/leasebacks, which petitioner rejected (I, 305-309; II, 612-613; III, 103-106).

Furthermore, it should need no extended discussion to dispose of the petitioner's argument that there is some

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3. Giving the petitioner the benefit of all inferences, it is undisputed that after early 1966, only three of the "base leases" remained to be released and Douglass admitted "that the Ohio Manager of Sinclair told him to find another supplier and that he 'assumed' that there would be an agreement freeing the three remaining stations from the base lease to Sinclair." (Pet. App. 6a).

distinction between an evaluation of proof of impact "upon Champion's freedom to select its suppliers" and an evaluation of proof of "foreclosure of competitors from the market" (Pet. 26-27). Clearly these propositions are two sides of the same coin. If there is no proof that Sinclair foreclosed its competitors from Champion's business, Champion was free to select its suppliers. Conversely, if there is no proof that Champion was prevented from selecting its suppliers, Sinclair's competitors were free to seek Champion's business. No linguistic exercise can alter the Court of Appeals' holding that there was no evidence that the lease/leasebacks had anything to do with petitioner's freedom to select its supplier, or other suppliers' freedom to select petitioner as their distributor.

Thus petitioner's major argument that the Court of Appeals "compartmentalized the evidence and narrowly conceptualized the instant case as fitting into the requirements contract mold" (Pet. 23) falls of its own weight without further argument.[4]

Petitioner's apparent reason for making this "compartmentalization" argument is presumably to attempt to demonstrate that the Court of Appeals should have considered purported 1965 evidence of Sinclair's "attempt to control" petitioner as evidence of Sinclair's "anticompetitive purpose" when the lease/leasebacks were entered into beginning in 1958 (Pet. 27-29, footnotes 10, 11).

The short answer to this contention is that petitioner candidly admits that the lease/leasebacks were "conventional land financing" instruments (Pet. 33) and were "recognized in the industry as appropriate to protect a

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4. It should be noted that, contrary to petitioner's representations to this Court, the Court of Appeals *expressly refused* to follow cases dealing only with requirements contracts (Pet. App. 9a).

particular legitimate interest" (Pet. 28). Thus petitioner has precluded itself from a finding that Sinclair possessed an "anticompetitive animus" in 1958 at the time the lease/leasebacks were entered into (See Petitioner's argument in footnote 10 on p. 27 of the Petition).

Further, however, and completely contrary to petitioner's representation to this Court, the Court of Appeals *did* fully consider petitioner's contention as to Sinclair's "attempt to control" petitioner. It stated:

> "It is the position of Champion that it was the intention of Sinclair to control Champion's portion of the Butler County petroleum products business by obtaining 15-year leases on Champion's prime service station sites, which leases had no escape clause, while at the same time leasing the stations back to Champion under an instrument which provided that the leaseback could be cancelled upon termination of the distributorship agreement. This intention was realized, says Champion, when Sinclair refused to release the stations, making it impossible for Champion to deal with a Sinclair competitor. Thus there are factors in this case which require us to look beyond Elder-Beerman and other cases dealing with exclusive supply agreements" (Pet. App. 9a).

The Court of Appeals, on the basis of the entire record, and particularly the evidence brought out on Douglass' cross examination (Pet. App. 6a); and after giving petitioner the benefit of inferences which the evidence fairly supported (Pet. App. 8a); simply found that there was insufficient evidence of such an intention, or the realization of such intention, to go to the jury (Pet. App. 11a).

There need be no discussion of any of the cases cited by petitioner since they all express legal principles which

are not at odds with any of the authorities cited by the Court of Appeals, nor are any of these cases contrary to its holding.

Nor is the case for review strengthened by petitioner's claim that the decision below "hobbles" the Sherman Act's "design" and "sweep" to protect independent distributors of petroleum products (Pet. 33-35). The true effect is exactly the opposite. Nothing could serve more to discredit the antitrust treble damage remedy than to award approximately $3,000,000 to a plaintiff whose damages are self-inflicted. The Court of Appeals has only reaffirmed that federal courts should not be encumbered by plaintiffs searching for windfalls at the expense of those who properly seek the aid of the courts.

CONCLUSION

Petitioner tried this case on the theory that it was prevented by Sinclair from affiliating with a competitive supplier as a result of the complained of lease/leasebacks and that, therefore, Sinclair was guilty of a restraint of trade.

The Court of Appeals correctly ruled that petitioner failed to present minimally adequate evidence of their stated case to go to a jury and that the District Court therefore erred as a matter of law in permitting the case to go to a jury.

No issue of any importance warrants review by this Court.

The petition for certiorari should, therefore, be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-812

CHAMPION OIL SERVICE COMPANY, *Petitioner*

v.

SINCLAIR OIL CORPORATION,
SINCLAIR REFINING COMPANY, and
ATLANTIC RICHFIELD COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondents, in their brief in opposition, urge three reasons for denying review of this Petition: (1) that upon the entire record the court of appeals properly found that Champion's inability to extricate itself from its financial predicament had nothing to do with the lease/leaseback and related arrangements with

Sinclair and was occasioned by Champion's poor financial condition; (2) that the holding that there was no unreasonable restraint was based on an appropriate analysis of the impact upon Champion and its market; (3) that review would relate only to the limited factual situation presented and would not deal with any question of substance not already decided by this Court.

I.

Respondents strenuously urge that the court of appeals properly found that it was Champion's poor financial condition which was the cause of its problems and not anything that Sinclair did with respect to its lease/leaseback and related arrangements with Champion (Br. in Opp. 10). However, respondents, like the court of appeals, rely upon a limited set of facts which ignore the basic thrust of the record evidence. There was sufficient evidence in the record upon which the jury could have inferred that Sinclair did, in fact, intend in 1965-1966 to gain control of the petroleum product volume of Champion and, pursuant to that intent, used the lease/leaseback arrangements in a manner which made it impossible for Champion to develop a distributorship arrangement with a Sinclair competitor. Although Champion was in financial difficulties, it was Sinclair's conduct toward Champion, reflecting its anticompetitive purpose of gaining control of Champion's volume, which precluded Champion from going to another supplier for a distributorship agreement (Pet. 14-17).

In emphasizing what Sinclair's competitors "actually did" in 1966, respondents fail to mention what Sinclair *actually did* in 1965-1966. Contrary to respondents' implication (Br. in Opp. 13), Sinclair's

management did not confine its activities in this period to speculation regarding what would occur if Sinclair did not release Champion's station. Sinclair's anti-competitive intent of gaining the Champion volume was formulated in 1965-1966 and culminated in Sinclair's control of that volume in 1968 (Pet. 11-14, 17-19). Both the formulation of Sinclair's anticompetitive intent and its conduct pursuant to that intent were Sinclair's reaction to the fact that, in 1965, 98% of the Champion volume was the petroleum product of Sinclair's competitors. To accomplish its purpose Sinclair could not permit Champion to develop a distributorship arrangement with a Sinclair competitor. Sinclair's management was fully aware that without the release of its stations Champion could not develop another distributorship with a competitor (Pet. 15-16). Not only did Sinclair refuse to release Champion from the leases as initially recommended by Mr. Kelly, Sinclair proceeded to take over the best four stations which were the subject of the lease arrangments (Pet. 15-16). This takeover, which reduced Champion's volume from 8 to 6 million gallons and increased Champion's cost of operation by one and one-half cents per gallon, was sufficient to undermine any possibility of Champion developing a distributorship agreement with a Sinclair competitor.

Respondent's attempt to gloss over the significance of the management decision to take over the four stations and the actual takeover by contending that Champion negotiated with competing suppliers based on the release of all seven stations (Br. in Opp. 4). This simply was not the case. The Citgo and Sun Oil negotiations took place on the basis that only three stations might be released (I App. 286-287, 290-291). Failure

to obtain release of the leases on all seven stations had a direct bearing on Champion's inability to improve its financial position. (I App. 268-269, 305).[1] Moreover, in 1965, Mr. Young, Vice President of Sinclair, turned down Douglass' request to be released from the lease arrangements on all the stations owned by Champion, which would permit Champion to go to competing supplier (I App. 246-247). And in 1968, when Douglass renewed the request to be released from these arrangements to go to another supplier, Mr. Gordy rejected that request (I App. 361-362; P. Ex. 21, III App. 28, 29; P. Ex. 57, III App. 65, 66). In short, Sinclair refused to release Champion from its lease arrangements with the full knowledge and intent that their failure to do so would substantially injure, if not thwart, Champion's attempts to extricate itself by going to another supplier. It did so with the purpose of precluding petroleum products of its competitors from being sold through Champion affiliated stations and with the purpose of gaining control of the Champion volume. Sinclair's success is dramatically reflected in the record by the fact that Sun, Citgo and American rejected a Champion distributorship in 1966 and Sinclair gained control of most of the Champion volume in 1968.[2] Based on this evidence, the jury could have inferred that Sin-

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[1] Contrary to respondents' assertion, Champion did not utilize the equities in the seven leased stations for financing (Br. in Opp. 8). Indeed, the evidence is uncontradicted that Champion utilized the equities in these stations to secure indebtedness and not for financing (I App. 300).

[2] Respondents misstate the record by urging that Doublass' 1968 attempts to obtain financing had nothing to do with the lease/leasebacks (Br. in Opp. 8). There was direct testimony that financial institutions rejected Champion's efforts for financial assistance because of the existing Sinclair lease arrangements (I App. 395).

clair had an anticompetitive intent, that it acted pursuant to that intent, and that this conduct was the proximate cause of Champion's inability to negotiate a distributorship agreement with a competing supplier.[3]

II.

Respondents attempt to utilize the court's finding on causation as the basis for arguing that the court of appeals did assess the competitive impact under Section 1 of the Sherman Act of Sinclair's activities. (Br. in Opp. 11-12). To the extent that the court of appeals' holding that there was no unreasonable restraint is based upon this causation finding, it suffers from the same defects as the finding itself. In particular, the court of appeals failed to adequately consider the abundant evidence that Sinclair intended that the adverse competitive effect upon Champion take place. Although the court of appeals did refer to Sinclair's intent in entering the arrangements with Champion in 1958 (Pet. App. 9a), the court did not consider the evidence of Sinclair's anticompetitive intent in 1965-1966, which persisted into 1968, and the import of such intent transforming otherwise possibly unobjectionable arrangements into anticompetitive instruments. *Times Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 614 (1953). Moreover, the court of appeals failed to analyze the anticompetitive consequences of Sinclair's conduct toward Champion within the appropriate geographic area during the critical period 1965 through 1968. The court's narrow focus is

[3] Contrary to respondents' suggestion (Br. in App. 6), the Tresler Oil Company proposal was not a viable distributorship offer since it was based on totally unrealistic assumptions (II App. 659-660, 670, 677-678).

completely inconsistent with a thorough rule of reason analysis under Section 1 of the Sherman Act.

III.

In failing to evaluate the nature of the adverse competitive effect on Champion and Sinclair's anticompetitive intent during the critical period 1965-1968, the court of appeals usurped the function of the jury in non *per se* rule of reason cases. The court's approach is totally inconsistent with previous decisions of the Sixth Circuit, which recognize that in non *per se* violations of the antitrust laws "the jury must determine whether the conduct in question unreasonably restrains trade." *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506, 517 (6th Cir. 1967). Nor can the Courts approach be squared with this Court's admonition in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962), that the question of proximate causation is for the jury to determine.

The instant case is also important because of the vulnerability that it imposes upon independent distributors dealing with large suppliers. If Sinclair had insisted that Champion purchase and sell only Sinclair products when Champion was forced in 1965 to purchase and sell the products of Sinclair's competitors, this could have given rise to a *per se* violation of the Sherman Act as a tie-in. *Redd* v. *Shell Oil Co.*, 1974-2 Trade Cases ¶ 75,390 (D.C. Utah 1974). While the formalities of a tying arrangement are not present here, the coercive aspects of Sinclair's conduct are analogous to tie-ins. Thus, the lease/leasebacks had the potential of dissuading Champion from selling petroleum products of Sinclair's competitors. When that did not work, Sinclair utilized its arrangements with

Champion and took control of most of the Champion product volume. Confronted with such evidence, the jury could properly infer that Sinclair's intent and conduct resulted in an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The decision below gives major integrated oil companies license, so long as *per se* violations are avoided, to utilize conventional land-financing and other long-term instruments to purposefully impose their will on local independent marketers and destroy those who insist upon their independence.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition, petitioner prays this Court to grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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